Circuit Court
County of Oakland

WENDY POTTS
CHIEF CIRCUIT JUDGE

1200 N TELEGRAPH RD DEPT 404
PONTIAC MI 48341-0404

SIXTH JUDICIAL CIRCUIT
OF MICHIGAN
(248) 858-0365
FAX 248-975-9787

September 25, 2009

Mr. Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: Proposed Amendment of Michigan Rules of Court 6.302
ADM File No. 2009-11

Dear Mr. Davis:

On behalf of a unanimous Oakland Circuit Court, I am writing with our comments regarding the proposed amendment of MCR 6.302 as set forth in ADM File No. 2009-11. We oppose the proposed amendment as it addresses plea negotiations because it is unnecessary, impractical, disruptive, and raises constitutional concerns.

1. **The Proposed Amendment to MCR 6.302 is Unnecessary.**

MCR 6.302 currently provides an exhaustive procedure by which pleas of guilty and nolo contendere are taken. MCR 6.302(B) requires that the plea be understanding, MCR 6.302(C) requires that the plea be voluntary, MCR 6.302(D) requires the plea to be accurate, and MCR 6.302(E) requires the Court to determine whether there are any other promises, threats or inducements not previously disclosed on the record. Accordingly, the result of any plea negotiations must be placed on the record, and the defendants and counsel are required during the plea procedure to specifically agree to the terms of any such plea agreement. This process more than adequately ensures that the terms of any plea agreement are made understandingly, voluntarily, accurately, and with no other undisclosed threats, inducements, or promises.

In addition, Michigan jurisprudence has long held that we should take the oath seriously, and that we expect criminal defendants to abide by the oath during pleas. See, e.g., *People v Serr*, 73 Mich App 19, 28, 30-31 (1976).

Our courts have operated and continue to operate with these fundamental understandings successfully. Our experience has been that very few criminal defendants challenge their pleas, and even fewer challenge them because of claims involving plea negotiations. We have not experienced complaints from prosecutors, defense lawyers, defendants, victims, or judges regarding the impropriety of the current plea process.

2. The Proposed Amendment to MCR 6.302 is Impractical.

The amendment creates an impractical requirement of full disclosure of plea negotiations that would significantly impair the orderly, efficient, and fair administration of justice. Currently, parties usually discuss the relative strength and weaknesses of their cases during the course of plea negotiations. The weight and credibility of witnesses is often discussed. The feelings of the victims are a common topic. Parties often discuss potential sentences if a plea agreement is not struck. Often criminal defendants agree to cooperate in the case or in other criminal investigations. Sometimes discussions occur even before cases are charged or warrants are written. These discussions are not ones that most lawyers, defendants, victims, law enforcement officers, and others feel a great desire to place on the record. To the contrary, these discussions are usually held with the understanding of strict confidence. Unquestionably, some of the most fruitful and fair plea negotiations will be impaired by the rule of full disclosure.

3. The Proposed Amendment to MCR 6.302 is Disruptive.

As currently drafted, the proposed amendment provides: "All discussions regarding a defendant's plea must take place in open court and be placed on the record." As jurists, we understand that each word has meaning. As such, the scope of the rule is so broad as to pose enormous burdens to the administration of justice.

The plain language of this rule clearly includes discussions between the prosecutor and defense counsel, among the court and counsel, and between the defense counsel and the defendant. Moreover, prosecutors often discuss pleas among themselves and superiors, as well as with victims. As such, one can reasonably find that such discussions fall within "All discussions." Likewise, defendants often discuss plea negotiations with family members and their "jailhouse lawyers." Under the broad swath of the current draft, all these discussions must take place on the record in open court.

The practical effect of such a rule is daunting. This would clog the courts' already busy dockets. A court would need to call each case where a plea agreement is being considered, and record discussions between lawyers, defendants, victims, law enforcement personnel, and others.

Even if the proposed amendment was modified to only address discussions among prosecutors, defendants, and the court, it would consume large portions of the courts' time and disrupt court dockets.

4. <u>The Proposed Amendment Raises Constitutional Concerns</u>.

Because the current language requires disclosure of discussions between defense counsel and a client (such discussions clearly fall within "All discussions" about a plea), it interferes with the constitutionally protected right to counsel and the attorney client privilege.

Accordingly, we oppose the proposed amendment because it is unnecessary, impractical, disruptive, and raises constitutional concerns.

Thank you in advance for your thoughtful consideration. I remain,

Very Truly Yours,

Wendy Potts
Chief Circuit Judge

WP:she
cc: All Circuit Judges